Supreme Court of the United States

OCTOBER TERM 1944

No. 360

UNITED FRUIT COMPANY,

Petitioner,

against

HARRY NEWMAN, FREDERICK BATCHELOR, JUAN URIBE, CRESCENCIO MARTIN, RAMON MOSQUERO, MARIO LEFLER and FRANCISCO MARTINEZ,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

CHAUNCEY I. CLARK,
NORMAN M. BARRON,
Counsel for Petitioner.

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IN THE

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, United Fruit Company, a New Jersey corporation (Respondent in No. 103 October Term, 1944), prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review its order, judgment and decree entered May 23, 1944 (R. p. 39), affirming a decree of the United States District Court

for the Southern District of New York entered June 21, 1943, awarding each of the respondents one month's wages under Sec. 594 Tit. 46 U. S. C. (R. p. 23).

Respondents, as petitioners, have applied for a writ of certiorari, which petitioner opposes (No. 103 October Term, 1944) on the ground that the Courts below erroneously denied them subsistence in addition to said one month's wages, and petitioner seeks the present writ on the ground that the Courts below erroneously allowed respondents any recovery under Sec. 594.

The certified transcript of the record, including the proceedings in said Circuit Court of Appeals, has been furnished by respondents in connection with their petition aforesaid in accordance with Rule 38, para. 1, of the Rules of this Court.

Summary Statement

The suit is for damages for alleged wrongful discharge of respondents under Title 46, U. S. C., Sec. 594 (R. p. 4), which provides:

> "*Right to wages in case of improper discharge.* Any seaman who has signed an agreement and is afterward discharged before the commencement of the voyage or before one month's wages are earned, without fault on his part justifying such discharge, and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, a sum equal in amount to one month's wages as compensation, and may, on adducing evidence satisfactory to the court hearing the case, of having been improperly discharged, recover such compensation as if it were wages duly earned" (R. S. 4527).

Petitioner's contention was that any and all liability to respondents on account of wages, under the statute or otherwise, terminated when the *Quirigua* was requisitioned by the United States Maritime Commission for delivery to the United States Navy prior to commencement of the contract voyage.

The District Court held that since the respondents were discharged "without fault on their part" and "without their consent" the liquidated damages provided by Sec. 594 should be imposed against the petitioner-shipowner notwithstanding that its discharge of the crew was admittedly due to government requisition, a cause beyond the shipowner's control which rendered performance impossible (R. pp. 12, 18-21). Although the District Court recognized that the statute provided for recovery by seamen "having been improperly discharged", i.e., for breach of contract of employment (R. p. 20), the Court regarded as irrelevant and unavailing petitioner's defense of impossibility or frustration.

The Circuit Court of Appeals by-passed the District Court's ruling and decided the appeal on the ground that petitioner either assumed the risk of the requisition or failed to prove that the requisition was "an excuse for the breach", i.e., for the crew's discharge (R. p. 38).

Questions Presented

1. Construction of Section 594.

Whether this statute authorizing recovery of stipulated damages in the event that seamen are "improperly discharged" may be construed to impose liability in the absence of fault on the shipowner's part and under circum-

stances excusing further performance of the contract on both sides, even though such construction would appear to be in conflict with the language of the statute and contrary to established law governing maritime contracts.

2. Risk of requisition.

Whether the risk of requisition can properly be cast on the petitioner where the parties have agreed that respondents' discharge was caused solely by the requisition, and such requisition is generally recognized as an adequate defense excusing a shipowner from further performance and from liability for breach of contract.

Reasons Relied On for Allowance of the Writ

1. In holding that liability may be imposed on the petitioning shipowner for extra wages under Sec. 594 as compensation for breach of its employment contract with the crew-respondents, notwithstanding the petitioner's valid defense that the requisition of the vessel was a supervening act excusing respondents' discharge and rendering further performance of the contract impossible, the District Court has erroneously construed this important statute affecting the mutual rights of seamen and their employers in a manner contrary to the decision of this Court in *The Steel Trader*, 275 U. S. 388. And, since the Circuit Court of Appeals rested its affirmance on other erroneous grounds, without considering the basic question of statutory construction which the District Court decided erroneously, the District Court's decision which introduces confusion and uncertainty in the matter of application of Sec. 594 to

seamen's cases, will not be reviewed and corrected unless the petition is granted.

2. In holding that the petitioner assumed the risk of the vessel's requisition, or that the requisition was not the excusing cause of respondents' discharge, the Circuit Court of Appeals has decided an important question of admiralty law contrary to the relevant decisions of this Court, as well as of the Circuit Court of Appeals, Second Circuit and Fourth Circuit, and of the highest courts in other important jurisdictions.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit sitting at New York, New York, requiring said Court to certify and send up to this Court, on a date to be designated, a full and complete transcript of the record and of all proceedings in the Circuit Court of Appeals had in this suit, to the end that this suit may be reviewed and determined by this Court; and the order, judgment and decree of the Circuit Court of Appeals be reversed; and that your petitioner be granted such other and further relief as may seem proper.

UNITED FRUIT COMPANY,
By CHAUNCEY I. CLARK,
Counsel.

New York, N. Y.,
August 16, 1944.

Supreme Court of the United States

OCTOBER TERM 1944

No.

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Respondents.

BRIEF IN SUPPORT OF THE PETITION

Opinions Below

The opinion of the District Court (R. pp. 18-21) has been reported at 50 F. Supp. 66. The opinion of the Circuit Court of Appeals (R. pp. 36-39) has been reported at 141 F. (2d) 191.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (Tit. 28, U. S. C., Sec. 347). The date of the decree of the Circuit Court of Appeals for the Second Circuit to be reviewed was May 23, 1944 (R. p. 39).

Statement of the Case

At Boston, May 27, 1941, petitioner received a telephone message from the Maritime Commission requesting prompt conference in Washington to discuss the question of delivery to the Navy for immediate use of two of its six ships of the *Chiriqui-Quirigua* class. At Washington the following day (May 28) petitioner's representative was advised verbally by the Commission of the President's May 27, 1941, proclamation authorizing it to requisition vessels under Sec. 902 of the Merchant Marine Act, 1936, as amended, for use in the national emergency; that the Navy had requested the Commission to requisition immediately the use of two ships of the *Chiriqui-Quirigua* class; and that the Commission would requisition the use of two of such ships then in the United States (R. p. 13). (The stipulation does not indicate the whereabouts of the *Quirigua*. Actually neither the *Quirigua* nor the *Chiriqui* were in the United States May 27—the *Veragua* being the only one of the six vessels then in port. The *Quirigua* arrived in port May 28, the *Chiriqui* June 1.)

Petitioner's representative pointed out that the *Chiriqui* and the *Quirigua* already were booked with cargo and passengers and that it would be inconvenient and expensive to cancel the passenger reservations and the cargo commitments, notwithstanding which the Navy Department, when advised of this difficulty by the Commission over the telephone, insisted that these two vessels be taken (R. pp. 13-14). Petitioner's representative was then advised (later on May 28)* that the Commission "would

* Erroneously stated by the Circuit Court of Appeals as May 29 (R. p. 37).

forthwith issue a requisition order and take possession of the vessels unless the Company agreed to take all steps necessary to make the ships available for the Navy not later than Monday morning, June 2, 1941, and that they desired them at the earliest possible moment" (R. p. 14).

On May 28, 1941,* while petitioner's representative was in Washington as above set forth, petitioner had engaged the respondents in New York as members of the *Quirigua* crew for a round voyage from New York to Central and South American ports, shipping articles being signed before a shipping commissioner which specified the monthly wages of each respondent (R. pp. 12, 33).

Subsequently petitioner's representative instructed petitioner's proper officers to prepare the *Quirigua* and the *Chiriqui* for delivery to the Navy at the earliest possible moment (R. p. 14), and petitioner advised the Maritime Commission by letters dated May 29 (R. pp. 16-17) that, having been informed by the Commission that the national defense required the Navy Department immediately to acquire the use of the vessels *Quirigua* and *Chiriqui* all existing arrangements for the vessels would be cancelled and the vessels delivered as demanded, notwithstanding that they both were already booked to their full cargo and passenger capacity (R. pp. 16-17).

On May 29, respondent, because of the aforesaid requisition, discharged petitioners, paying them their wages earned up to the time of discharge (R. p. 12).

On May 31 the *Quirigua* was tendered, and on June 2 was delivered, to the Navy pursuant to the aforesaid requisition (R. p. 14).

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* Erroneously stated by the Circuit Court of Appeals as May 29 (R. p. 37) but correctly stated at R. p. 38.

FIRST POINT

The District Court decision, left uncorrected by the Circuit Court of Appeals, is in conflict with this Court's construction of Section 594, Title 46, U. S. Code.

In the Circuit Court of Appeals both sides contended that recovery under Section 594 constitutes recovery of liquidating damages as for breach of contract, and not recovery of a penalty. Such position is sound in view of numerous authorities to effect that the parties must be assumed to have contracted with reference to the statute. *The Steel Trader* (*United States Steel Products Co.* v. *Adams*), 275 U. S. 388, 390; *Calvin* v. *Huntley,* 178 Mass. 29; *Arwine* v. *Alaska S.S. Co.,* 189 Wash. 437, 65 P. (2d) 695.

Since the obligation of Section 594 as concerns extra wages must be regarded as contractual, the owner should be entitled to assert against seamen's claims thereunder any defense—including the defense of impossibility—ordinarily available to excuse contractual performance.

The District Court decided that respondents were entitled to one month's wages regardless of whether or not their discharge was "improper", i.e., whether or not the shipowner had a legal defense excusing further performance (R. p. 20). The Court relied on a statement of legislative intent by one Conger, quoted in *The Steel Trader,* 275 U. S. 388 (R. p. 19), who in reporting the bill to the House of Representatives said:

> "The bill is substantially the Shipping-Commissioner's Act of England [The British Merchant Shipping Act of 1854] with such changes as have been deemed necessary to adapt it to this country * * *" (p. 390).

The British Act provides as follows:

> "Sec. 167. Any seaman who has signed an agreement, and is afterwards discharged before the commencement of the voyage, or before one month's wages are earned, without fault on his part justifying such discharge and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, due compensation for the damage thereby caused to him, not exceeding one month's wages, and may, on adducing such evidence as the Court hearing the case deems satisfactory of his having been *so* improperly discharged *as aforesaid*, recover such compensation as if it were wages duly earned" (pp. 390-391). (Italics ours.)

For purposes of comparison the material differences between the British statute and Section 594 have been italicized.

The District Court recognized the difference between the two statutes, but stated that "The 'so' and the 'as aforesaid' can refer only to absence of fault and absence of consent on the part of the seaman" (R. p. 20), whereas petitioner's position is that omission of the words "so" and "as aforesaid" from Section 594 clearly indicated legislative intent to reach a different result and selection of words appropriate to accomplish such intent, namely, that a seaman's discharge must be "improper" in the sense of having been occasioned without the shipowner having any adequate legal defense therefor.

Section 594 is not ambiguous and should be given its plain meaning, especially in view of its legislative background above mentioned. The District Court gave the language of the statute a strained and illogical meaning where the need for such interpretation was entirely lacking. *People ex rel. Bockes* v. *Wemple*, 115 N. Y. 302, 308.

In *Hopkins* v. *Moore-McCormack Lines, Inc.*, 175 Misc. 109, affirmed 262 App. Div. (N. Y.) 722, the Court refused to rule as matter of law that a seaman, discharged prior to earning one month's wages without his consent or any fault on his part, was entitled to recover one month's wages under Section 594 against the defendant shipowner who had rendered further performance impossible by its voluntary compliance with the public policy of the United States concerning ship employment as expressed by the President's proclamation.

Florentine v. *Grace Line, Inc.*, 1942 A. M. C. 126 (App. Term, N. Y.), and *Jorgenson* v. *Standard Oil Company*, 1940 A. M. C. 1169 (Mun. Ct., N. Y.), affirmed without opinion 262 App. Div. (1st Dept.) 999, leave to appeal denied 263 App. Div. 708, certiorari denied 315 U. S. 819, relied on by respondents in the Circuit Court of Appeals, involved entirely different questions and are not in point.

The only decision which we have found that appears to be contrary to petitioner's contention is *The St. Paul*, 77 Fed. 998 (D. C., N. Y.),* where a break occurred in the main steam pipe leading to the port engine after the crew was signed on, which made the voyage impracticable (not impossible) and the crew was discharged after a three-day standby period. The District Court held that the crew members were entitled to recover under Section 4527 R. S. (now Sec. 594 of Title 46) even though it thought that "the discharge of the libelants under the circumstances was reasonable and justifiable * * * and except for the statute, probably no further wages or compensation could have been recovered by them" (p. 998). This view is only a dictum since the temporary breakdown would not furnish sufficient basis for a legally excusable discharge.

* Not relied on by respondents below.

The St. Paul was not appealed, and was cited in *Arwine* v. *Alaska S. S. Co.,* 189 Wash. 437, 440, as a case where the crew's discharge involved some element of fault on the part of the owner.

As against *The St. Paul* dictum, sound legal reasoning and the clear implication of this Court's decision in *The Steel Trader,* 275 U. S. 388, fully support petitioner's view that legal excuse for a seaman's discharge which would enable the shipowner to defend successfully a suit for breach of contract apart from Section 594, likewise precludes recovery of stipulated damages under Section 594.

In *The Steel Trader* this Court indicated very distinctly that recovery of one month's wages as stipulated in Section 594 was intended to constitute satisfaction for

> "all liability for breach of the contract of employment by wrongful discharge. The legislation was intended to afford seamen a simple, summary method of establishing and enforcing damages" (p. 390).

Surely the direct implication from such statement is that *wrongful discharge by the shipowner not legally excusable but rendering the owner liable for breach of the contract* is a condition precedent to seamen's recovery. This implication is further strengthened by the Court's explanation of the statutory declaration that the "one month's wages" shall constitute recovery *"as compensation"* upon the complaining seamen's "adducing evidence satisfactory to the court hearing the case, of having been improperly discharged":

> "The word *compensation,* in §4527 [Sec. 594], distinctly indicates that payment of a sum equal to one month's wages was intended to constitute the remedy for invasion of the seaman's right through breach of his contract of employment in the circumstances specified. 'Damages consist in compensation for loss sustained. * * * By the general system of our law, for

> every invasion of right there is a remedy, and that remedy is *compensation*. This compensation is furnished in the damages which are awarded.' Sedgwick's Damages, 9th Edition, Vol. 1, page 24. See also *Bauman* v. *Ross*, 167 U. S. 548" (p. 391).

Where, as here, the parties have stipulated that the requisition of the *Quirigua* was the sole cause of the seamen's discharge, and as matter of substantive law such supervening act excuses further performance of the contract on both sides (Point II), it is clear that there was no "invasion" of any seaman's rights "through breach of his contract of employment" and therefore no legal basis for "*compensation*" or damages.

The clear import of the caption of Section 594, "*Right to wages in case of improper discharge*", as well as the context of the section as above discussed, cannot properly be disregarded.

Since Section 594 is a statute of frequent application involving the rights of seamen and shipowners, and an important question of its construction has been decided erroneously by the District Court in a manner contrary to the decision of this Court in *The Steel Trader*, and left uncorrected by the Circuit Court of Appeals, petitioner's application for a writ of certiorari should be granted.

SECOND POINT

The decision below that the petitioner assumed the risk of the *Quirigua's* requisition, and that the requisition did not relieve petitioner from all further obligations under its employment contract with respondents, is in conflict with decisions of this Court, as well as of the Circuit Court of Appeals for the Second and Fourth Circuits.

Petitioner's submission to the requisition, May 29, 1941,* as confirmed to the Maritime Commission by petitioner's letters of that date (R. pp. 16-17), made impossible, and excused, further performance of its employment contract with respondents, who thereupon were discharged (R. p. 12).

The Circuit Court of Appeals affirmed the District Court's decree without finding it necessary to consider or pass upon the proper construction of Section 594 (Point I), on the ground that petitioner had assumed the risk of requisition and had failed to meet the burden of proving that "the requisition was an excuse for the breach" (R. p. 38). In so doing the Court disregarded the statement in the stipulation of facts that "the libellants were discharged by the respondent United Fruit Company for the sole reason that it had been required by the United States Maritime Commission to deliver the S.S. *Quirigua* to the United States Navy and therefore to cancel all existing arrangements for the scheduled sailing of the vessel in the circumstances set forth in the affidavit"

* Later formalized by execution of a requisition charter (R. pp. 14-15).

appearing in the Record, pp. 13-15, and overlooked the prevailing rule, well settled in this Court and elsewhere, that vessel requisition, when as here the cause of terminating contract obligations, constitutes commercial impossibility which provides the shipowner with adequate legal excuse or defense as regards subsequent non-performance. *Texas Co.* v. *Hogarth Shipping Co.*, 256 U. S. 619; *Allanwilde Transport Corporation* v. *Vacuum Oil Co.*, 248 U. S. 377; *The Kronprinzessin Cecilie*, 244 U. S. 12; *Columbus Railway & Power Co.* v. *Columbus*, 249 U. S. 399; *The Claveresk*, 264 Fed. 276 (C. C. A. 2); *The Isle of Mull*, 278 Fed. 131 (C. C. A. 4); *W. J. Tatem, Limited* v. *Gamboa*, [1939] I. K. B. 132; *Bank Line, Limited* v. *Arthur Capel & Co*, [1919] A. C. 435, and other cases.

In *Texas Co.* v. *Hogarth Shipping Co.*, 256 U. S. 619, this Court said:

> "It long has been settled in the English courts and in those of this country, federal and state, that where parties enter into a contract on the assumption that some particular thing essential to its performance will continue to exist and be available for the purpose and neither agrees to be responsible for its continued existence and availability, the contract must be regarded as subject to an implied condition that, if before the time for performance and without the default of either party the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it" (pp. 629-630).

Neither the President's proclamation, May 27, 1941, which authorized the Maritime Commission to requisition vessels for national defense purposes, nor the Commission's telephone message to petitioner in Boston the same day to effect that discussion in Washington was desired on

the question of delivery to the Navy for immediate use of two of petitioner's ships of the *Chiriqui-Quirigua* class, can properly be regarded as notice to the petitioner of the requisition of a particular ship of said class such as the *Quirigua*, which vessel, as petitioner's representative in Washington pointed out to the Commission on May 28, already had been fully booked with passengers and freight (R. pp. 13-14). Nor can the Washington conversations, May 28, properly be considered as an assumption by petitioner of the risk of requisition of the *Quirigua*. The words "these two vessels", "the vessels" and "said vessels" in the affidavit incorporated in the stipulation of facts (R. p. 14) were not intended to refer to the *Quirigua* (not in the United States May 27) or the *Chiriqui* (not in the United States until June 1), or to any two specific vessels, but merely to such two of "these ships" (i.e., the six ships) of the *Chiriqui-Quirigua* class as the Maritime Commission, at the Navy's request, would soon requisition when in the United States (R. p. 13). "Formal requisition" of the *Quirigua* was not "made on the 28th" as the Circuit Court of Appeals said (R. p. 38). It was not until May 29 that petitioner submitted to the Commission's general demand and itself allocated the *Quirigua* and the *Chiriqui* to the requisition (R. pp. 14, 16-17).

In the words of this Court in *Texas Co.* v. *Hogarth Shipping Co.*, as applied to the May 28 hiring of respondents by petitioner in New York,

> "The event apparently was not anticipated and there was no provision casting the risk on either party. Both assumed that the ship would remain available and that was the basis of their mutual engagements. These, we think, must be regarded as entered into on an implied condition that, if before the time for the voyage the ship was rendered unavailable by such a

> supervening act as the requisition, the contract should be at an end and the parties absolved from liability under it" (p. 631).

That no facts competent to raise an issue as to assumption of risk were intended by the agreed statement (R. pp. 11-17) is shown by the absence of any contention in the courts below that there was any fault attributable to the petitioner in connection with its discharge of the respondents.

Certainly it cannot be urged with any validity that petitioner did not sustain the burden of proving that the requisition was an excuse for discharge of the respondents simply because the stipulation of facts did not specify what any Court was entitled to take judicial notice of—namely, the probability that under the existing circumstances the Navy's use of the *Quirigua* under requisition would extend beyond the short round voyage for which the respondents were signed on. *The Claveresk*, 264 Fed. 276, 282-283 (C. C. A. 2).

Petitioner's prompt submission on May 29 as regards the *Quirigua* to the requisition threatened "forthwith" by the Maritime Commission with respect to two of six similar ships at the Navy's insistence (R. p. 14), without waiting for the governmental lightning to strike, does not affect its right to avail of impossibility as an effectual defense. *The Claveresk*, 264 Fed. 276, 281-282 (C. C. A. 2); *Roxford Knitting Co.* v. *Moore-Tierney, Inc.*, 265 Fed. 177 (C. C. A. 2), cert. den. 253 U. S. 498; *Mawhinney* v. *Millbrook Woolen Mills*, 231 N. Y. 290; *Hopkins* v. *Moore-McCormack Lines, Inc.*, 175 Misc. 109, aff'd 262 App. Div. (N. Y.) 722.

We cannot believe that petitioner is to be penalized for not being a laggard, i.e., for not compelling the Com-

mission to issue a formal requisition order on May 29 or shortly thereafter, in which case the defense of impossibility unquestionably would have been available.

CONCLUSION

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that an important statute relating to the rights of seamen may be properly administered, and that to such an end the writ of certiorari prayed for should be granted, that the decisions of the Circuit Court of Appeals and of the District Court be reversed, and that the libel be dismissed, with costs.

CHAUNCEY I. CLARK,
NORMAN M. BARRON,
Counsel for Petitioner.

New York, N. Y.,
August 16, 1944.

(32)

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

Question Involved

The petition raises the question whether the decisions in the courts below are in conflict with decisions of this court and those of other circuits.

POINT I

The construction placed upon Section 594 by this court supports the decisions of the courts below.

From early times Congress has adopted a protective attitude towards seamen. Legislation enacted with respect to their service on board vessels was intendd for their protection and for the enlargement of their rights.

46 U. S. C. A. Section 594 is one of these statutes. In enacting this statute Congress apparently had in mind the then known historic fact that seamen were often unemployed for great periods of time; that when they finally did obtain employment they frequently had to leave the lodging houses in which they lived, even though they may already have paid their rent for the entire week; and that the seamen usually then had to go through the trouble of packing all their personal belongings to take them on board ship. When a seaman was, therefore, offered a berth aboard a vessel which contemplated a short voyage he might, and often did, decide that the trouble and expense were not worth the wages which could be earned on such a short voyage—and he frequently preferred to wait until an opportunity presented itself to work aboard a vessel offering longer employment.

Congress, therefore, provided by Section 4527 of the Revised Statutes (46 U. S. C. A., §594) that where a shipowner induces seamen to work aboard his ship, and represents by the shipping articles that they are undertaking a foreign voyage to a specific port, he may not thereafter discharge them without their consent, and without fault on their part. It is declared to be our policy that where a shipowner does violate this provision of law, advertently or inadvertently, and even though with the best of intentions and without actual fault on the employer's part, he is, nevertheless, required to pay an additional month's wages to the seamen thus discharged, such payment being in lieu of damages.

The payment of such an extra month's wages, in cases where seamen are discharged without their fault before earning one month's wages, and where the articles have not yet expired, has thus, by law, become part of the operating expense of every shipowner.

The petitioner attempts to place a strained and distorted meaning on the statute in question. However, this construction is amply refuted by the opinion of Judge

Rifkind in the District Court in the instant case. He stated:

> "In *The Steel Trader*, the court recited the legislative history of the statute and quoted the statement of the Representative who reported the bill to the House of Representatives, 'The bill is substantially the Shipping-Commissioner's Act of England with such changes as have been deemed necessary to adapt it to this country * * *.' The clause relied on by the respondent reads somewhat different in the English statute, thus: 'May, on adducing evidence as the Court hearing the case deems satisfactory of his having been so improperly discharged as aforesaid, recover' the compensation specified. The 'so' and the 'as aforesaid' can refer only to absence of fault and absence of consent on the part of the seaman. In other words, a discharge before the commencement of a voyage or before one month's wages are earned is improper if the seaman withholds his consent and is without fault.
>
> While the italicized words do not appear in §4527, nevertheless they may be read into it in order to give effect to the legislative intent to adopt 'substantially the Shipping-Commissioner's Act of England'. Such construction of the statute is consonant with its purpose as defined by the Supreme Court. In The Steel Trader, the court held that compliance with the statute by the payment of one month's wages in addition to the wages actually earned 'satisfies all liability for breach of contract of employment by wrongful discharge'. It would be strange if a statute designed for the benefit of seamen should not only deprive them of the ordinary claim for breach of contract by wrongful discharge but should leave the employer in possession of all defenses to the statutory remedy for one month's wages as if it were a claim for a breach of contract. Such a construction would be inconsistent with the historic solicitude of the courts for the rights of seamen."

Almost the identical situation as in the instant case was presented to the court in *Florentine* v. *Grace Lines, Inc.*, 1942 A. M. C. 126 (App. Term, 1st Dept.), where seamen

were discharged in order to sell the steamship *Nightingale* to the Maritime Commission for purposes of transfer to the British Government under the provisions of the Lend-Lease Act. The Appellate Term awarded the seamen an extra month's wages pursuant to 46 U. S. C. A. §594.

The most recent case involving this statute was *Jorgenson* v. *Standard Oil Company,* 1940 A. M. C. 1169 (Mun. Ct.), aff'd App. Term (1st Dept., Dec. 18, 1940), aff'd App. Div. (1st Dept., Oct. 10, 1941); cert. den. by U. S. Supreme Court in 315 U. S. 819 (Mar. 16, 1942). There, while an American vessel, the *W. C. Teagle,* was in a foreign port, it was sold, and its crew discharged, before earning one month's wages. The employer there gave the seamen only return transportation, in addition to the wages which they had earned. An action was instituted on behalf of the crew for an extra month's wages, relying upon the same statute as that relied upon herein. One of the grounds on which the company there sought to avoid liability was that it had cancelled the voyage in conformity with the spirit of the Neutrality Act, which was intended at that time to keep American seamen and vessels out of war zone areas. The Municipal Court held that defense, as well as others raised, to be insufficient as a matter of law, and upon appeal both the Appellate Term and the Appellate Division of the First Department affirmed, and certiorari was denied by the United States Supreme Court.

Similarly, in the *Great Canton,* 299 Fed. 953 (E. D. N. Y., 1924), the court held that the sale of a vessel, even without an owner's voluntary consent, does not constitute a defense to an action for an extra month's wages under the particular statute. There a crew had been discharged in a domestic port by reason of the fact that their ship was sold on execution prior to the expiration of the voyage. Not only did the court award extra wages under Section 4527 of the Revised Statutes (46 U. S. C. A. §594), but, in addition, the seamen were awarded the penalties provided by Section 4529 of the Revised Statutes (46 U. S.

C. A. §596), to wit, two days' pay for every day they were made to wait before receiving their extra month's wages.

In the case of *Arwine* v. *Alaska S.S. Co.* (1937), 65 P. (2d) 695, 189 Wash. 437, the court had occasion to consider the effect of Revised Statutes, Section 4527, in awarding the crew a month's wages. The Supreme Court of Washington, by Mr. Justice Robinson, stated at page 696:

> "We think, however, that the statute does not provide a penalty, but merely fixes the seamen's measure of recovery when his contract of employment is brached without his fault. The language seems too clear and definite to admit of any other construction. In any event, it was so construed in The Steel Trader, 275 U. S. 388, reported in 48 Sup. Ct. 162, 72 L. Ed. 326, under the U. S. Steel Products Co. v. Adamas, and we are bound by that decision.
>
> The statute under discussion is one of a number of Federal statutes giving seamen rather unusual rights and remedies with respect to wages. * * *
>
> These wage statutes were enacted upon the theory that seamen needed special protection and they have been liberally construed in their favor for the same reason. In fact, at the time of their enactment, seamen were regarded as being in need of a kind of guardianship, because seamen are repeatedly spoken of in text books and law reviews as 'wards of the admiralty'. It is true that seamen have since acquired other and very efficient guardianship, particularly as regards wages, but these statutes are still in effect and must be enforced according to their original intent."

The statute was also considered in *Calvin* v. *Huntley*, 176 Mass. 29, 50 N. E. 435 (1901). (This decision has been expressly approved and quoted from by the United States Supreme Court in *The Steel Trader*, 275 U. S. 388, 48 Sup. Ct. 162 [1928].) In that case the Supreme Judicial Court of Massachusetts held that an award under Section 4527 of the Revised Statutes is not a penalty and that, therefore, an action to recover same may be commenced

in the State courts. The court there also pointed out that the statute fixes a sum equal to one month's wages as the sum to be paid for the failure to perform the contract, Hammond, J., stating at page 435:

> "It is to be observed that the language of the section is not that ordinarily used in a penal statute. Neither the word 'penalty' nor 'forfeiture' is in it. Moreover it does not provide punishment for the commission of a criminal offense, nor for the neglect of a statutory duty, nor even for the neglect of a duty in the performance of which the public as such may be supposed to have an interest. It speaks not of punishment, but of compensation. Its object is to protect the seamen from loss rather than punish the master for discharging him. The remedy is given to the seaman alone * * *."

POINT II

There is no conflict between the Second and Fourth Circuits.

The cases cited by petitioner in support of its contention that there is a conflict between circuits are not in point. In those cases the question involved concerned contractual rights rather than those arising out of a statute. In addition, the contracts themselves contained clauses with respect to acts of princes and other force majeur which would excuse performance. It is petitioner's contention that the statute provides a contractual right which should be subject to all defenses, including the defense of impossibility. It also contends that the requisitioning of the vessel made impossible the performance of the employment contract. However, petitioner ignores the fact that at the time the seamen were engaged there existed many statutes authorizing the government to requisition vessels without the owner's consent.

Despite the fact that the war abroad had been raging for many months prior to the time when the parties herein entered into the employment contract, nevertheless the owner of the vessel took no precaution to limit its liability to the crew in the event of requisition by the government under existing statutes, which would make it impossible for petitioner to continue the voyage. Faced with these known facts the company undertook absolutely, by written contract (the shipping articles), to give the seamen employment for a certain stipulated voyage. It never notified the seamen that, even prior to the signing on, it had already learned that the steamship *Quiriqua* was to be requisitioned.

In this connection it is interesting to note the case of *Societe Anonyme et al.* v. *Bull Insular Lines, Inc.*, 276 Fed. 783 (C. C. A., 1st, 1921), where a steamship company was held liable for a failure to perform its contract due to war conditions. Certiorari was denied in the Supreme Court (258 U. S. 621). In that case Circuit Judge Anderson stated at page 785:

> "The contract was made in July, 1916, after the European War had been flagrant for almost two years. The parties must have known of the increasing hazardous possibility, if not probability, that the United States would become, as it subsequently was, involved in the war. The contract was made during the war, in contemplation of changing war conditions."

See, also, *Brevard Tannin Co.* v. *J. F. Mosser Co.*, 288 Fed. 725 (C. C. A., 4th, 1923), where Circuit Judge Taft, at page 727, stated:

> "Defendant, in its answer, interposed defenses that the performance had become impossible because of a government embargo and war conditions. The Court charged the jury that those constituted no defense. The promise of the defendant was without exception or condition on that head. The contract was made during the war. The District Court was clearly right. Day v. United States, 245 U. S. 159, 161, 38 Sup. Ct.

57, 62 L. Ed. 219; Carnegie Steel Co. v. United States, 240 U. S. 156, 164, 36 Sup. Ct. 342, 60 L. Ed. 576; Globe Refining Co. v. Lands Cotton Oil Co., 190 U. S. 540, 543, 544, 23 Sup. Ct. 754, 47 L. Ed. 1171; Jacksonville R'way Co. v. Hooper, 160 U. S. 514, 527, 16 Sup. Ct. 379, 40 L. Ed. 515; The Horriman, 9 Wall. 161, 172, 19 L. Ed. 629; Berg v. Erickson, 234 Fed. 817, 148 C. C. A. 415, L. R. A. 1917 A. 648."

See, also, *Campbell* v. *Uncle Sam,* Cir. Ct. Cal., Fed. Cas. No. 2372, where a crew was discharged in violation of the terms of their shipping articles and sued for an extra month's wages. The shipowner defended on the ground that the voyage was scheduled for Nicaragua, which was then in such an unsettled military state of affairs that considerations of safety required the voyage to be cancelled. The Court held that the condition of that country having been the same at the time the seamen were engaged, they were entitled to recover extra wages for the breach of their contract of employment.

The respondent stresses the point that the vessel having been requisitioned, it was impossible to perform the employment contract and the respondent was free from any fault. The question here, however, is not whether the unexpected requisitioning of the vessel places the owner at fault in discharging the personnel hired by him but rather whether the hiring of seamen with knowledge of the impending requisition was improper. In the instant case there was no sudden or unexpected change of law or of circumstances after the contract was entered into. At the time the contract was entered into the requisitioning statute was long in effect, the war was on, an emergency had already been declared, and the company had already been notified on the day previous that this vessel was to be requisitioned. Nevertheless, it saw fit not to notify respondents of this contingency and to enter into an absolute contract with these seamen, promising them employment for a foreign voyage.

CONCLUSION

Since the discharge herein was before one month's wages had been earned, without fault on the part of the crew, and in contravention of the articles, it falls squarely within the prohibitions contained in Section 4527 of the Revised Statutes (46 U. S. C., §594). There being no valid defense, a decree was properly granted in favor of the seamen.

The petition should be denied.

Respectfully submitted,

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